BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JANINE DEBACKER	)	
Claimant	)	
V.	)	
	)	CS-00-0448-430
ARDENT HEALTH SERVICES	)	AP-00-0451-652
Respondent	)	
AND	)	
	)	
TRUMBULL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 15, 2020, preliminary hearing Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Roger D. Fincher appeared for Claimant. P. Kelly Donley appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from June 5, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUE

Respondent argues under the going and coming rule, Claimant's fall did not arise out of and in the course of her employment. Claimant's injury does not fall under the exceptions of the going and coming rule as she was leaving for the day and on her way to her car when the accident occurred and was not on the only route from her work. Respondent argues the Order should be reversed, as Claimant fell on a public sidewalk not under the control of Respondent.

Claimant argues the ALJ's Order should be affirmed.

The issue is whether Claimant met with personal injury by accident arising out of and in the course of her employment with Respondent.

FINDINGS OF FACT

The ALJ found Claimant suffered an accidental injury to her right shoulder arising out of and in the course of her employment with Respondent. This accidental injury was the prevailing factor for Claimant's need for medical treatment. The ALJ ordered Respondent to provide the names of two physicians for Claimant to select an authorized treating physician to treat Claimant until she reaches maximum medical improvement or finds palliative care is no longer required for Claimant's work-related injuries. Respondent was ordered to pay $500 in unauthorized medical. Claimant's request for temporary total disability benefits was denied.

On December 17, 2019, Claimant finished her work shift for Respondent and clocked out. Claimant left the hospital building where she worked to go to the parking garage where her car was parked. The parking garage is located across the street (Mulvane Street) from the building where she worked. After Claimant crossed the street, she tripped and fell on the sidewalk just outside the entrance to the parking garage. Claimant estimates she was five feet away from the parking garage entrance when she fell.

The parking garage is owned and maintained by Respondent. The sidewalk where Claimant fell runs parallel to the parking garage and Mulvane Street. The parking garage and apartments are the only structures running parallel to the sidewalk where Claimant fell. These apartments are used by families who have family members in the hospital. There is also an enclosed walkway located on the second floor of the hospital building connecting to the parking garage.

The parking garage is open to the public. Parking is free. Respondent does not require employees to park in this garage. There are areas within the parking garage designated for employees. There are other parking lots where Claimant may park and Claimant has parked in those areas in the past.

Claimant believes the sidewalk she fell on is part of Respondent's premises. Claimant reported her accident to Brady, who Claimant understood handles workers compensation for Respondent. Initially, Brady told Claimant it was not Respondent's property where she fell, but that opinion changed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2019 Supp. 44-508(h) states:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

> more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2019 Supp. 44-508(f)(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This statute codifies a common law doctrine known as the “going and coming rule”. Generally, an injury is not compensable if it occurs when an employee is on the way to assume work duties or having left their work duties.

There are three exceptions to the going and coming rule. The exceptions are: the premises exception; the special hazard exception; and accidents occurring where coming and going is an incident of the employment.[1]

With regard to the premises exception, the Kansas Supreme Court has held whether the employer exerts control over the area where the accident occurred is the primary factor for determining whether an accident occurred on employer’s premises.[2]

Respondent owns the parking garage where Claimant’s car was parked and where Claimant was going when she fell. However, Claimant did not fall in the parking garage owned by Respondent, but instead fell on the sidewalk approximately five feet away from the entrance to the parking garage.

As a general rule, sidewalks are considered public. However, the facts in this case call that general rule into question.

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[1] *See Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[2] *See Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 37, 883 P.2d.768, (1994).

Respondent has a covered walkway on the second floor of the hospital building where Claimant worked connecting the building to the parking garage. Instead of using the elevated walkway, Claimant used the street and the sidewalk to enter the parking garage. This route Claimant used generally followed the path of the covered walkway. Such a walkway incorporates the parking garage and hospital building into one area controlled by Respondent.

There is very little evidence in this case as to the maintenance and control of the sidewalk next to the parking garage. Respondent contends there are several sidewalks surrounding the parking garage and they are all public sidewalks. Therefore the sidewalk where Claimant fell is a public sidewalk. This argument is weakened by a couple of factors. First, Claimant believed the sidewalk was part of the employer's premises. Second, when Claimant reported her accident to Brady, he eventually acknowledged the area where Claimant fell could be on Respondent's premises. Respondent presented no evidence to counter those factors.

This is a close case because the evidence of the ownership and control of the sidewalk is sparse. However, it is found and concluded Claimant's accident occurred on the employer's premises. The sidewalk was closely connected to the parking garage owned by Respondent. The area where Claimant fell was an area of the sidewalk whose primary function was to provide access to the parking garage. The parking garage and access to the parking garage from the hospital building is interconnected due to the presence of a covered walkway connecting the hospital building and the parking garage. The covered walkway generally follows the path of the sidewalk where Claimant fell. Claimant's accident occurred in an area covered by the premises exception to the going and coming rule.

Due to the finding Claimant's accidental injury is within the premises exception to the going and coming rule, ruling on the other two exceptions is moot. The ALJ's decision is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2019 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

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[3] K.S.A. 2019 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Steven M. Roth dated June 15, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

_____
HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Roger D. Fincher, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Hon. Steven M. Roth, Administrative Law Judge